ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 190-1997
September 15, 1997

INQUIRY RE: The adequacy of a search conducted by the then Ministry of Social Services for records requested by the applicants, the adequacy of the Ministry's explanation for its severing of the records, and the application of section 22 to the records

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.oipcbc.org

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on July 3, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the adequacy of the then Ministry of Social Services' search for the records requested by the applicants, the adequacy of the Ministry's explanation of its severance of the records released to the applicants, and the appropriateness of the application of section 22 to the records. References to "Ministry" below are to the new Ministry of Human Resources.

2. Documentation of the inquiry process

On December 14, 1995 the two applicants submitted separate requests for "all and complete file(s) in the possession of the Ministry of Social Services under [the name of the applicant] singly or collectively." The Ministry responded to one of the applicants on April 30, 1996 and the other on May 2, 1996. In both cases, records were supplied to the applicants with some severing of third party personal information under section 22 of the Act.

On June 4, 1996 both applicants requested this Office to review the adequacy of the search, the adequacy of the explanation for the severance, and the correctness of the severance under section 22.

The original ninety-day deadline of September 5, 1996 was extended to October 8, 1996 to permit further mediation. On October 17, 1996 the applicants requested a further extension which was granted until January 8, 1997. During this time, the Ministry continued its search for records. On December 9, 1996 the Ministry located additional records that fell within the scope of the requests.

On December 20, 1996 the applicants requested another extension of time to review the new set of records disclosed by the Ministry, and the inquiry was adjourned *sine die* (until further notice). On January 22, 1997 the Ministry requested a date for the inquiry be set. A new date was set for April 16, 1997.

On April 4, 1997 the applicants requested a further extension, due to a series of personal setbacks. The Ministry opposed this extension but submitted, in the alternative, that the matter should be adjourned to a set date. A new extension was granted until May 23, 1997.

On May 9, 1997 the applicants, through their advocate, requested a fifth extension in order to allow their advocate to prepare a submission. The Ministry did not oppose this request, and the inquiry was again adjourned to June 11, 1997. On June 2, 1997 the applicants asked for another extension, due to further personal difficulties. The Ministry took no position on this request, and the inquiry was adjourned to June 17, 1997.

On June 16, 1997 the applicants again requested an adjournment to properly prepare their submission. The Ministry opposed this request. A final adjournment to July 3, 1997 was granted.

3. Issues under review and the burden of proof

There are two issues under review. The first is whether the Ministry met its duty to assist under section 6 of the Act by conducting an adequate search and by providing an adequate explanation of how the information was severed under section 22. The second issue is whether the Ministry appropriately applied section 22 to the records.

Section 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to a request for review concerning the adequacy of a records search. I find that the burden of proof is on the public body. (Order No. 103-1996, May 23, 1996)

Section 57 is also silent with respect to a request for review about the duty to assist under section 6 of the Act. I conclude that the burden of proof is on the public body. (Order No. 110-1996, June 5, 1996)

Under section 57(2) of the Act, if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the

applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

The relevant portions of sections 6 and 22 read as follows:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

4. Procedural objections

There were four procedural issues. Two objections were made by the applicants to prevent having their files reviewed jointly. All of the evidence that I have reviewed in this voluminous set of submissions indicates that it is appropriate for their access requests to be reviewed in the same inquiry, not least because of the necessity of using public funds efficiently. The requests deal with the same issues and substantially the same material.

The third is from the Ministry objecting to the inclusion of a number of mediation letters by the applicants in their submission. The procedures of my Office require that a party to an inquiry obtain the permission of the other parties prior to including correspondence developed in the mediation phase in their submissions. In this particular case, this is complicated by the applicants' desire to have a large portion of their submission, including the mediation letters, to be *in camera*. My Office has provided me with these letters in a sealed envelope to allow me to review the *ex parte* applicants' argument for including them in the submission prior to reading them. I consider it is inappropriate to review such mediation materials and I have chosen not to do so.

The fourth and final issue concerns the reliance of the applicants on *in camera* submissions, an issue which I will address below.

5. The applicants' case

The applicants submit that they have not received all of the records that they asked for. They believe that other records exist that have not been provided and that they have not received an adequate accounting of the Ministry's searches for those records. The applicants provided me with a lengthy list of records that they are still seeking to access.

The applicants state that they believe that disclosure of some of the records in dispute would reveal "statements and allegations made about the Applicants which are untrue, slanderous and defamatory, and vexatious." Since this information has also led to them being denied social assistance, they argue that disclosure of such documents from third parties would not be an unreasonable invasion of their privacy. (Submission of the Applicants, pp. 15, 16)

I have presented below certain specific arguments advanced by the applicants with respect to the application of sections of the Act.

6. The Ministry's case

The Ministry submits that the only issues in this inquiry are the adequacy of its search for records under section 6(1) of the Act and whether it has met its duty to inform the applicants about which part of section 22 was used to refuse disclosure of third party personal information.

7. Discussion

After reading the materials, I have some sympathy with the situation in which the applicants find themselves with respect to their dealings with the Ministry concerning social assistance and other benefits; however, I also have similar empathy with what appears to have been good faith efforts by the Ministry and other public bodies and tribunals to address these various issues. Freedom of information requests will not provide the solution that will really assist these applicants.

In camera submissions

The applicants made a significant proportion of their submissions on an *in camera* basis. I have reviewed all of this material. Most of it concerned issues that are not central to the decisions that I have to make in this inquiry. I am unable to address other matters that the applicants raised as "issues" since they were presented to me on an *in camera* basis. It is even more regrettable that the applicants made actual arguments about the application of sections of the Act on an *in camera* basis, because I am unable to comment on them publicly. Furthermore, in order for me to include the applicants' arguments in my deliberations, they should not be made *in camera*, in the best of circumstances, because to do so deprives public bodies of the opportunity to make a reply.

The Ministry requested that I order disclosure of *in camera* submissions that were germane to actual issues in this inquiry in order that it could have a right of reply. (Reply Submission of the Ministry, paragraph 1.01) I did not do so in this case because I did not require argument from the Ministry on those matters.

Section 6(1): Duty to assist applicants

I am in full agreement with the Ministry's submissions as to the nature of a "reasonable search" under the Act and the appropriate scope of a search conducted in response to requests for access by applicants such as this one. (See Submission of the Ministry, paragraphs 4.01-4.07)

I have reviewed the Ministry's detailed description of the various searches that were undertaken with respect to these requests. (See Submission of the Ministry, paragraphs 4.08-4.26) I agree with the Ministry that it "has now made every reasonable effort to respond to the Applicants' request for records." (Submission of the Ministry, paragraph 4.27)

I do not agree with the applicants' detailed description of what "a reasonable search" for elusive records should consist of in the circumstances of this inquiry. (Reply Submission of the Applicants, pp. 1-3)

I think that the Ministry of Human Resources, and its predecessor, have gone out of their way to try to help these applicants who have been making substantial demands on an already burdened system.

Section 6 requires public bodies to respond to each applicant "openly, accurately and completely." I agree with the applicants that this duty to assist includes specifically identifying the sections and subsections of the Act, whenever possible, which are relied on to justify the refusal of disclosure. Section 6 requires public bodies to provide as much information as possible in responding to access requests. Such information demystifies the legislation and assists applicants to understand the public body's response.

In this case, as the Ministry eventually provided the applicants with appropriate information about the reasons for severances, I find it has met its duty to assist under section 6.

Severing on the basis of section 22 of the Act

The Ministry considered section 22(3)(c) in making a determination that disclosure would be an unreasonable invasion of third party privacy. The applicants submit that the Ministry's decision not to disclose records provided by former landlords or other third parties should be rebuttable by section 22(4)(b). (Submission of the Applicants, pp. 11, 13) I disagree with the applicants' reliance on this subsection in the circumstances of this particular case. Based on my review of the submissions, the evidence fails to establish "compelling circumstances affecting anyone's health or safety." The applicants have failed to discharge their burden of establishing that disclosure would not be an unreasonable invasion of the third parties' privacy.

The provision of summary information to the applicants

The applicants suggest that there is a common law duty to provide them with a clear summary of the contents of the documents that the Ministry has refused to disclose. (Submission of the Applicants, pp. 11, 17-18) I agree with the Ministry that this issue is not properly before me in this inquiry. (Reply Submission of the Ministry, paragraph 3.03)

8. Order

I find that the Ministry of Human Resources in conducting the search in this case made every reasonable effort within the meaning of section 6(1) of the Act and adequately identified to the applicants the basis for its decision to withhold records under section 22(3)(c) of the Act.

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the head of the Ministry of Human Resources was required to refuse access to the information in the records in dispute under section 22 of the Act. Under section 58(2)(c), I require the head of the Ministry of Human Resources to refuse access to the applicants. I also find that the Ministry of Human Resources has discharged its duty under section 6(1) of the Act.

_____

David H. Flaherty
Commissioner

September 15, 1997